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No. 90-1390

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, *Petitioner*

v.

EVERT ROMEIN, ET AL., *Respondents*

FORD MOTOR COMPANY, *Petitioner*

v.

ARTURO GONZALEZ, ET AL., *Respondents*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF MICHIGAN SELF-INSURERS' ASSOCIATION

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## BRIEF AMICUS CURIAE OF MICHIGAN SELF-INSURERS' ASSOCIATION

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Michigan Self-Insurers' Association ("MSIA") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for petitioner General Motors Corporation and petitioner Ford Motor Company has been obtained. The consent of the attorney for respondent Attorney General of the State of Michigan has been obtained. The consent of the attorney for the respondent Evert Romein and respondent Arturo Gonzalez was requested but refused.

The interest of the MSIA in this case arises from the fact that it is a non profit association organized under the laws of Michigan that is comprised of more than two hundred employers and defined groups of employers that are authorized by the State of Michigan to insure their own risk of liability to their employees under the Michigan Workers' Disability Compensation Act ("WCDA"), Mich. Comp. L. Ann. 418.611(1)(a); Mich. Stat. Ann. 17.237(611)(1)(a). These members conduct business in all sectors of the economy ranging from manufacturing, sales, service, technology, health care, education and collectively employ hundreds of thousands of persons and, as equally significant, are presently responsible for workers' disability compensation benefits under the WDCA to tens of thousands of former employees.

Thus it is that the MSIA is vitally concerned with the WDCA and questions that involve validity and implementation.

In addition, each of the constituent members of the MSIA are subject to pending claims or are subject to future pending claims in the state courts under the specific legislation now challenged.

It is believed that the brief which *amicus curiae* requests per-

mission to file will contain a depth of perspective on the course of the legislation and the context in which it exists and thereby provide assistance in the deliberation of the constitutional issues involved.

Respectfully Submitted,

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## SUMMARY OF ARGUMENT

A strong workers' disability compensation system is an important part of the welfare of the economy and of the people providing as it does an important link in the protection of employers as well as unemployed and underemployed workers. In Michigan, the legislature took action in 1980-1981 to so strengthen its particular workers' disability compensation system by harmonizing wage-loss benefits to be provided by employers with other wage-replacement systems that had become pervasive after the workers' disability compensation system was initially established. Mich. Comp. L. Ann. 418.354(1); Mich. Stat. Ann. 17.237(354)(1). Pursuant to this civil right and liability, employers "coordinated" wage loss benefits for five years. Then, in a complete surprise, the 1987 session of the legislature ended further coordination for a certain group of former employees — those injured before the original enactment — and mandated that those benefits that had been paid (or, were payable) for the time prior to the amendment in 1987 had to be recalculated even though the past-paid benefits were in scrupulous compliance with the law in-effect at the time payment had been made.

The MSIA shall show that this amendment requiring a redetermination of the civil rights and liabilities of employers for periods of time before the amendment was unprecedented and unprincipled.

## ARGUMENT

### I.

### THE LEGISLATIVE HISTORY OF THE *FRANKS* AMENDMENT REFLECTS THAT THERE HAS BEEN A VIOLATION OF THE CONTRACTS CLAUSE AND DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

*Amicus curiae* Michigan Self-Insurers' Association ("MSIA") supports the *Petition For Certiorari* filed by respondents General Motors Corporation and Ford Motor Company (collectively,

"Employer") following the decision by the Michigan Supreme Court in *Romein* v *General Motors Corp*, 436 Mich. 515; — N.W.2d — (1990), *reh. den.*, — Mich —; — N.W.2d — (1990) in which an amendment to the Michigan Workers' Disability Compensation Act ("WDCA"), 1987 Mich. Pub. Acts No. 28, codified at Mich. Comp. L. Ann. 418.354(17-20); Mich. Stat. Ann. 17.237(354)(17-20)[1] was held to be a valid exercise of the regulatory power of the Michigan Legislature over a challenge based on the Contracts Clause[2] and the Due Process Clause[3] of the United States Constitution. The MSIA presents four concerns that arise from legislative history.

First, the *Franks* Amendement is unprecedented in its scope. Since its inception in 1912,[4] the WDCA[5] has been repeatedly

[1]Popularly known as the *Franks* Amendment for the decision of the Michigan Supreme Court that it repudiated. *Franks* v *White Pine Copper Div*, 422 Mich. 636; 375 N.W.2d 715 (1985), *reh. den. sub. nom., Chambers* v *General Motors Corp*, 424 Mich. 1202; 389 N.W.2d 685 (1985).
See Appendix A for full text.

[2]The United States Constitution provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post factor Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."
>
> U.S. Const. art. I, § 10.

[3]The United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> U.S. Const. amend. XIV, §1

[4]1912 Mich. Pub. Acts No. 10, Part II, §11 (1st Extra Session.) The WDCA was derived in large part from the compensation law initiated in Great Britian years before in 1897.

[5]This is a process that has occurred in Britian. Indeed, the British law of 1897 upon which the WDCA was itself amended in 1906.



amended to modify and to sometimes entirely redefine the civil rights and liabilities of employers and of employees. The longest continuous period of time that elapsed without any amendment to the WDCA was a five year period of time between 1922 and 1926, inclusive.[6] Indeed, the WDCA has been amended every single year between 1960 and 1983. A frequent reason for the fine tuning and, in some cases, major overhauls was the response by the Michigan Legislature to decisions of the Michigan Supreme Court over the implementation and interpretation of the WDCA. For example, the WDCA was amended in 1927 to counteract the impact of the specific decision of the Michigan Supreme Court, in *Geis* v *Packard Motor Car Co*, 214 Mich. 646; 183 N.W. 196 (1921) in response to its open invitation.[7] And the Michigan Supreme Court itself has recognized that the amendments in 1980[8] and in 1981[9] were designed to repudiate or modify certain interpretations of the WDCA that had been applied by the Supreme Court or Court of Appeals. *Dean* v *Chrysler Corp*, 434 Mich. 655; — N.W2d — (1990), *reh. den.*, 435 Mich. 1204; — N.W.2d — (1990). In that case, the Michigan Supreme Court said:

> "A purpose of the comprehensive 1980 and 1981 revisions of the workers' compensation system was to overturn or modify expansive interpretations placed upon the act by this Court. Although the dollar amount of benefits payable to workers eligible for compensation was increased, there can be no doubt that the Legislature also intended through its 1980 and 1981 reform efforts to narrow and restrict the eligibility qualifications."
>
> *Dean* v *Chrysler Corp*, *supra*
> at 666-667.

[6]1921 Mich. Pub. Acts No. 10 and 1927 Mich. Pub. Acts No. 63.

[7]The Michigan Supreme Court stated in *Geis*, *supra*, at 651; "We must stick to the statute and leave defendant to present the equity of its position to the legislature."

[8]1980 Mich. Pub. Acts No. 357.

[9]1981 Mich. Pub. Act No. 203.

See also, *Hurd* v *Ford Motor Co*, 423 Mich. 531; 377 N.W.2d 300 (1985) in which the Michigan Supreme Court recognized that another provision of the 1980-1981 amendments, codified at Mich. Comp. L. Ann. 418.301(2); Mich. Stat. Ann. 17.237 (310)(2), was designed to repudiate the earlier decision in the case of *Deziel* v *Difco Laboratories, Inc, (After Remand)*, 403 Mich. 1; 268 N.W.2d 1 (1978.)

Clearly then, the *Franks* Amendment is nothing new because it represents a legislative repudiation or modification of a decision of the Michigan Supreme Court that implemented or interpreted earlier legislation.

Rather, the *Franks* Amendment *is* unprecedented because it represents the only time in more than sixty years time of regular and extensive modification and redefinition of the civil rights and liabilities of employees and employers that the legislature ever applied itself to events that occurred *before* enactment. This is most important. Until the *Franks* Amendment, the Michigan Supreme Court consistently and strictly confined the application of any amendment of the WDCA to establish the civil rights and liabilities of affected employees and employers to the time *after* enactment even though initialized or "triggered" by events before enactment in order to avoid the constitutional problems now at-issue. For example, in the case of *McAvoy* v *H.B. Sherman Co*, 410 Mich. 419; 258 N.W.2d 414 (1977), *reh. den.*, clarification granted, 402 Mich. 953; — N.W.2d — (1977) the Michigan Supreme Court was concerned with an amendment to the WDCA that required an employer to pay an employee partial weekly workers' disability compensation benefits during an administrative appeal, Mich. Comp. L. Ann. 418.862; Mich. Stat. Ann. 17.237(862). The Michigan Supreme Court ruled that the provision was applicable to the time periods after its enactment even though initialized or "triggered" by an event that occurred before enactment; namely, a pending appeal. But the Michigan Supreme Court emphasized that the time periods before enactment were not subject to the amendment in order to avoid any constitutional issue under the Contracts Clause. *McAvoy, supra*, at 456-459. Indeed, in the case of *Franks* that was the subject of repudiation by the *Franks* Amendment, the Michigan Supreme Court went to lengths to emphasize that only the benefits running from the enactment were subject to it even though the initializing or "triggering" event for the payment was an award for injury that occurred before to the enactment. See also, *Lahti, infra.*



Thus, it is clear that the Michigan Supreme Court in the case of *Romein, supra*, has broken with its own precedent and broken new ground with the ratification of the *Franks* Amendment.

The second reason for concern over the *Franks* Amendment is its far reaching implications. The decision of the Michigan Supreme Court is not limited to the parochial area of workers' disability compensation. Instead, the decision of the Michigan Supreme Court represents authority for any assertion of legislative power to redefine or reorder civil rights and liabilities that *were* entirely settled under prior law.

It must be emphasized that the fact of the matter is that pursuant to the unanimous decision of the Michigan Supreme Court in *Franks, supra*, an employer *had* the civil right and duty to calculate and pay to an employee base weekly workers' disability compensation benefits from March 31, 1982, and *had* to adjust or "coordinate" such with any other parallel, employer-funded wage-replacement program. Now, under the *Franks* Amendment, that which was done in full and strict accord with contemporaneous law is declared illegal, impermissible and to be undone.

Certainly, the process that was "due" to employers and employees was that established by the Michigan Supreme Court in *Franks, supra*, and has been impermissibly abrogated.

The third concern is the disequilibrium in the administration of justice. The Court may well enquire what would be the law

when an even later session of the legislature enacted an amendment repudiating the *Franks* Amendment and revived *Franks* and required employees to refund all the money to now be reimbursed under the *Franks* Amendment. Under the decision of the Michigan Supreme Court in *Romein, supra,* such a later amendment would control. Of course, until yet another, still later session of the legislature repudiated that and revived the *Franks* Amendment.

Clearly, under the decision of the Michigan Supreme Court in *Romein, supra,* the law-making process and its applicability would *never* be settled. This is a cornerstone to the American system of law. In *Marbury* v *Madison,* 1 Cranch. 137, 2 L. Ed. 60 (1803) the Court ruled that the judicial branch had the duty to finally say what the law is. This, of course, may be changed by amendment for future events. But not for events already completed in accord with contemporaneous law. Otherwise, the legislature acquires the role of making the law *and* being the final arbiter of such and relegating the judiciary to an advisory body.

Certainly, the disequilibrium that is surely invited by the *Franks* Amendment is avoided and prevented by the Contracts Clause and Due Process Clause.

Fourth, the history of the *Franks* Amendment itself reflects a serious misunderstanding by the enacting legislators. In Michigan there is no parallel to the *Congressional Record* so that the thoughts and concerns of the sponsors and supporters of legislators is not generally available.

In this case however, there is available a good indicia of the concern of the sponsors and supporters of the *Franks* Amendment about its constitutionality. That official legislative indicia is a memorandum dated May 13, 1987, from State Representative Michael Griffin. State Representative Griffin said:

> "MEMORANDUM
> "TO: House Members and the Capital Press Corps
> "FROM: State Representative Michael J. Griffin
> "RE: Constitutionality of Governor Blanchard's workers' compensation/'*Chambers*' proposal



> "For the past few days several legislators have questioned the constitutionality of Governor Blanchard's proposed amendment to completely overturn the Supreme Court's unfair *Chambers* decision.
>
> "The attached opinion from a respected legal firm specializing in labor law argues that this is not the case.
>
> "I agree with their opinion and urge you to resist efforts to change the Governor's *'Chambers'* proposal based on the so-called constitutionality issue."

Quite clearly, just one day before enactment of the *Franks* Amendment on May 14, 1987, there was a significant concern over the validity of the retrospective nature of the *Franks* Amendment.

The memorandum referenced by State Representative Griffin cited a case decided by the Michigan Supreme Court that purportedly authorized a purely retroactive amendment, *Lahti* v *Fosterline,* 357 Mich. 578; 99 N.W2d 490 (1959.) Specifically, the opinion referenced by State Representative Griffin declared:

> "It is well established, however, that a change in the remedies afforded under contract are not prohibited. *Lahti* v *Fosterling,* 357 Mich 578, 595 (1959):
>
> " '. . . no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law . . .'"

The problem is that *Lahti, supra,* is in no way different at all from the rule announced by the Michigan Supreme Court in cases such as *McAvoy, supra* or *Franks, supra.* In that case, the Michigan Supreme Court was concerned with an amendment to the WDCA of June 25, 1955[10] that redefined the civil right and liability for medical care cost reimbursement for an occupational injury. The employee in that case sought payment of medical

[10] 1955 Mich. Pub. Acts No. 250 (Part 2, §4)

care that was provided *after* 1956.[11] Clearly, there was no issue in *Lahti, supra,* that medical care cost incurred *before* the 1955 amendment could not be ordered when certainly barred under the contemporaneous law. All that was claimed was medical care cost reimbursement for service after the amendment. That is absolutely no different than the situation in *McAvoy, supra,* or in *Franks, supra,* where the statute in-effect *contemporaneous* to civil rights was applied; and that amendment was not applied to civil rights *prior to* the enactment.

Clearly then, the 1987 session of the legislature did not have a clear understanding of the serious action it implied with the enactment of *Franks* Amendment. The presumption of the constitutionality of a statute is not fully applicable.

A final consideration is the notation by the Michigan Supreme Court in *Romein* concerning the reasonability of the *Franks* Amendment. The Michigan Supreme Court said in *Romein, supra,* at 536;

> "The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted. The means chosen here are reasonable in the light of deference given to legislative action. 'As is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' *United States Trust Co* v New Jersey, 431 US 1, 22-23; 97 S Ct 1505; 52 L. Ed 2d 92 (1977). The means are also reasonable since the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute. The judicial interpretation that allowed for the setoff was deemed to be incorrect and the setoff must be returned, not an unreasonable solution."

[11]The Michigan Supreme Court observed the following facts in *Lahti, supra,* at 581:

> "John Lahti was injured on October 4, 1954, while working as a wood-cutter for the defendant employer.
>
> "He was a bed patient from that time until his death on February 10, 1958. He suffered a comminuted and compound fracture of the skull, permanent paralysis, loss of speech, and inability to consume food in the natural manner, and was totally and permanently disabled, requiring continuous and substantial medical, nursing, and hospital care.
>
> "The expense of the continuous hospitalization and medical care was voluntarily assumed by the defendants through October 4, 1956, a period of 2 years, or 4 six-month periods from the date of the injury. Compensation at the regular rate was also paid plaintiff."



As indicated, the deference to the legislature is not entirely warranted here in light of the inapplicability of *Lahti, supra.* But more to the point, the Michigan Supreme Court in *Romein* appeared to believe that its decision in *Franks* was "unexpected." *Franks* was not an "unexpected" circumstance. The statute construed by the Michigan Supreme Court in *Franks, supra,* was just as clear and as unequivocal as the Supreme Court had said it was. It went unchallenged for more than a year. What truly has occurred here is that a differently comprised legislature decided to redefine *existing and established* civil rights and liabilitites. That is not the law. That is not constitutional.

## CONCLUSION

The Petition For A Writ Of Certiorari To The Supreme Court Of Michigan should be granted to the Petitioners.

Respectfully Submitted,

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AA

# APPENDIX

## MICHIGAN WORKERS' DISABILITY COMPENSATION ACT
1987 Mich. Pub. Act No. 28.

The decision of the Michigan supreme court in *Franks* v *White Pine Copper Division*, 422 Mich 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, if having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

This section applies only to payments resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring on or after March 31, 1982. Any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have not been coordinated under this section as of the effective date of this subsection shall not be coordinated, shall not be considered to have created an overpayment of compensation benefits, and shall not be subject to reimbursement of the employer or carrier.

Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of this subsection, to the employee by the employer or carrier.

Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or carrier because that employee's benefits had not been coordinated under this section and whose date of personal injury was before March 31, 1982 shall be reimbursed with interest, within 60 days of the effective date of this subsection, that money by the employer or carrier.

If any portion of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not effect the validity of the remainder of this section.

HOUSE OF REPRESENTATIVES
Representative
Michael J. Griffin
50th District — Jackson

May 13, 1987

MEMORANDUM

TO: House Members and the Capitol Press Corps
FROM: State Representative Michael J. Griffin
RE: Constitutionality of Governor Blanchard's workers' compensation/*"Chambers"* proposal

For the past few days several legislators have questioned the constitutionality of Governor Blanchard's proposed amendment to completely overturn the Supreme Court's unfair *Chambers* decision.

The attached opinion from a respected legal firm specializing in labor law argues that this is not the case.

I agree with their opinion and urge you to resist efforts to change the Governor's *"Chambers"* proposal based on the so-called constitutionality issue.



SACHS, NUNN, KATES, KADUSHIN, O'HARE,
HELVESTON, WALDMAN, P.C.
Attorneys and Counselors At Law
1000 Farmer
Detroit, Michigan 48225

May 12, 1987

TO: Frank Garrison, President
Michigan State AFL-CIO
FROM: Melvyn J. Kates
Granner S. Ries
RE: Proposed "Chambers Language in the House Substitute for S.B. 67

Governor Blanchard's proposed amendments to the worker compensation law includes a provision to completely reverse the effects of the 1985 *Chambers* decision of the Michigan Supreme Court.

Since that time, some have contended that this proposal is unconsitutional.

We disagree.

The rationale is outlined in the attached four pages.

The power of the legislature to pass retrospective laws is limited primarily by the constitutional maxim that such retrospective legislation may not impair the obligation of a contract. *Metro Homes Inc.* v. *City of Warren*, 19 Mich App 664, 671-672 (1969). It is well established however, that a change in the remedies afforded under a contract are not prohibited. *Lahti* v *Fosterling*, 357 Mich 578, 595 (1959):

> ". . . no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law . . ."

*Lahti* relied extensively upon a decision in New York entitled *Matter of Hogan* v *Lawlor & Cavanaugh*, 286 App Div 600; 146 NYS2d 119, wherein at page 604, the New York court stated:

> "The due process clause of the State and Federal con-

stitutions does not freeze the burden of compensation liability as of the date of the occurrence of an industrial accident, beyond the power of legislative change. *In carrying out its social purpose, the legislature has the power to increase the burden on the employer for disability occurring or continuing after the date of the enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time.*"

Consequently, the legislature in adjusting the employer's obligation to pay workers' compensation benefits has the power to increase the burden of payment even though the expense occurred prior to that the effective date of amendatory statue.

A restoration of the employer's obligation to make payment of workers' compensation benefits without consideration of other benefits, as existed prior to 1982, does not create a new cause of action for an employee and merely remedies an existing injustice through the limitation of a statutory defense. No contractual right is destroyed in such circumstances:

> ". . . no right is destroyed when the law restores a remedy which has been lost."
>
> *Lahti, supra* at 589; quoting *Evans Products Co* v *State Board of Escheats*, 307 Mich 506, 545, quoting from *Campbell* v *Holt*, 115 US 620; 65 SCt 209; 29 LEd 483

It is to be noted that the restoration of benefits previously withheld must be made within 60 days *after* the effective date of the amendment and that no penalty is imposed upon the employer for failure to make earlier payment. This remedies any potential constitutional problem for, whatever extent employers or carriers may have relied upon the previous statute or decisions interpreting it, there is no vested right in the previous statute and the remedies provided thereunder may be altered without impairing the obligation of a contract. *Lahti, supra* at 595.



The constitutionality of a proposal to restore benefits lost via the Court's decision in *Franks* v *White Pine Copper*, 422 Mich 636 (1985), may also be justified as curative legislation. Curative legislation does not impair the obligations of a contract and is merely designed to authorize what the legislature had the power to authorize but, through omission, failed to do so. *Stott* v *Stott Realty Co*, 288 Mich 35 (1939), relying upon the rule that there is "no vested right in statutory privileges of exemptions" page 44, and "no vested right to any particular remedy;" page 46

An example of curative legislation in a workers' compensation context is found in *Freij* v *St Peters Church*, 72 Mich App 46, *aff'g*, 12975 WCABO 3223. The legislature had previously passed a law which reduced the payment of workers' compensation benefits by 5% per year for individuals who were 65 years old or older. However, the legislation reduced those benefits for those individual on the assumption that they would be receiving social security benefits even for those individuals who were not, in fact, receiving those benefits. Subsequently, the legislature enacted 1974 PA 184 and created an exception, codified as MCL 418.357(2), stating that the reduction could not be applied to those individuals who were not entitled to social security benefits. The Court of Appeals held that, regardless of what the legislature intended when the legislation was originally enacted, "it seems apparent that the 1974 amendment must have been intended to remedy what had come to be perceived as a pernicious consequence of the existing legislation; that benefit recipients were having their benefits reduced even though they did not begin to receive social security payments", *Freij, supra* at 460, and the Court affirmed the ruling of the Appeal Board that the amendment was retroactive and could be applied to eliminate the reduction in benefits previously enacted but not intended to be applied to individuals injured previously.